

1 Michael D. Adams (State Bar No. 185835)  
madams@rutan.com  
2 Meredith L. Williams (State Bar No. 292888)  
mwilliams@rutan.com  
3 Sarah Van Buiten (State Bar No. 324665)  
svanbuiten@rutan.com  
4 RUTAN & TUCKER, LLP  
18575 Jamboree Road, 9th Floor  
5 Irvine, CA 92612  
Telephone: 714-641-5100  
6 Facsimile: 714-546-9035

7 Attorneys for Defendant  
COSTCO WHOLESALE CORPORATION

8  
9 UNITED STATES DISTRICT COURT  
10 CENTRAL DISTRICT OF CALIFORNIA  
11

12 DECKERS OUTDOOR  
CORPORATION, a Delaware  
13 Corporation,

14 Plaintiff,

15 vs.

16 COSTCO WHOLESALE  
CORPORATION, a Washington  
17 Corporation; and DOES 1-10, inclusive,

18 Defendant.  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Case No. 2:25-cv-04174-MCS-AGR

Judge: The Hon. Mark C. Scarsi

**DEFENDANT COSTCO  
WHOLESALE CORPORATION'S  
REPLY IN SUPPORT OF MOTION  
TO DISMISS PLAINTIFF'S FIRST  
AMENDED COMPLAINT  
PURSUANT TO FED. R. CIV. P.  
12(b)(6)**

Hearing:

Date: September 15, 2025

Time: 9:00 a.m.

Ctrm: 7C

Date Action Filed: May 9, 2025

Trial Date: Not set

## TABLE OF CONTENTS

		<u>Page</u>
1		
2		
3	I. INTRODUCTION.....	1
4	II. RELEVANT FACTS RELIED ON BY DECKERS .....	1
5	III. DECKERS INCORRECTLY ARGUES THAT THE FAC	
6	REQUIRES NO SUBSTANTIVE FACTS TO SURVIVE A	
7	MOTION TO DISMISS.....	2
8	IV. DECKERS' CONCLUSORY ALLEGATIONS LACK FACTS	
9	RENDERING SECONDARY MEANING PLAUSIBLE.....	3
10	1. Deckers' Bare Legal Conclusions and Meaningless	
11	Qualifiers Cannot Support Secondary Meaning.....	3
12	2. Deckers Could Plead Non-Confidential Sales	
13	Figures, Image Advertising, or a Secondary	
14	Meaning Survey, But Does Not.....	5
15	3. Deckers Does Not Allege Facts Relied On	
16	Elsewhere To Deny A Motion To Dismiss,	
17	Including Deliberate Copying .....	6
18	4. Deckers Abandoned UCL Attorneys' Fees and the	
19	Tasman, Changing Trade Dress Elements for the	
20	"Tasman II".....	9
21	V. CONCLUSION .....	9
22		
23		
24		
25		
26		
27		
28		

# **TABLE OF AUTHORITIES**

## **Page(s)**

### **FEDERAL CASES**

*Adidas-Salomon AG v. Target Corp.*,  
228 F. Supp. 2d 1192 (D. Or. 2002)..... 5

*Am., Inc. v. Skechers USA, Inc.*,  
890 F.3d 747 (9th Cir. 2018)..... 5

*Bell Atl. Corp. v. Twombly*,  
550 U.S. 544 (2007) ..... 2

*Clicks Billiards, Inc. v. Sixshooters, Inc.*,  
251 F.3d 1252 (9th Cir. 2001)..... 8

*Daniels v. Specialized Loan Servicing, LLC*,  
2023 WL 4291651 (C.D. Cal. Apr. 20, 2023)..... 3

*Deckers Outdoor Corp. v. Fortune Dynamic, Inc.*,  
2015 WL 12731929 (C.D. Cal. May 8, 2015)..... 8

*Deckers Outdoor Corp. v. Wal-Mart Stores, Inc.*,  
No. 2:20-CV-09521-FLA (EX), 2024 WL 2208099 (C.D. Cal. Apr. 9, 2024)1, 6

*First Brands Corp v. Fred Meyer, Inc.*,  
809 F.2d 1378 (9th Cir. 1987) ..... 6

*Fuddruckers, Inc. v. Doc’s B.R. Others, Inc.*,  
826 F.2d 837 (9th Cir. 1987)..... 8

*Givenchy S.A. v. BCBG Max Azria Grp., Inc.*,  
No. CV 10-8394-GHK SHX, 2012 WL 3072327 (C.D. Cal. Apr. 25, 2012)..... 5

*Homeland Housewares, LLC v. Euro-Pro Operating LLC*,  
2015 WL 476287 (C.D. Cal. Feb. 5, 2015)..... 7, 8

*Hot Focus Inc. v. Best Accessory Grp. LLC*,  
2022 WL 3013032 (C.D. Cal. June 23, 2022)..... 3, 8

*Jason Scott Collection, Inc. v. Trendily Furniture, LLC*,  
68 F.4th 1203 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 550 (2024)..... 6, 8

	<u>Page(s)</u>
<b>FEDERAL CASES (CONT'D)</b>	
<i>Kittrich Corp. v. United Indus. Corp.</i> , 2017 WL 10434389 (C.D. Cal. Oct. 18, 2017) .....	8
<i>P &amp; P Imps. LLC v. Johnson Enters., LLC</i> , 46 F.4th 953 (9th Cir. 2022) .....	8
<i>S&amp;B Filters, Inc. v. ETN Cap., LLC</i> , 2022 WL 2204144 (C.D. Cal. Mar. 9, 2022) .....	8
<i>Solid Host, NL v. Namecheap, Inc.</i> , 652 F.Supp.2d 1092 (C.D. Cal. 2009) .....	7
<i>Star Athletica, LLC, v. Varsity Brands, Inc.</i> , 137 S. Ct. 1002 (2017) .....	1
<i>Vision Sports, Inc. v. Melville Corp.</i> , 888 F.2d 609 (9th Cir. 1989) .....	8
<i>Wal-Mart Stores, Inc. v. Samara Bros.</i> , 529 U.S. 205 (2000) .....	1, 7, 9
<b>RULES</b>	
Federal Rules of Civil Procedure rule 12(b)(6) .....	2
<b>NON-PERIODICAL PUBLICATIONS</b>	
1 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION section 8:7 (5th ed.) .....	4
U.S. Copyright Office, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES section 924.2 (3d ed. 2021) .....	1

1 **I. INTRODUCTION**

2 Deckers is notorious for attempting to extend intellectual property protection  
3 to its shoes based on alleged unregistered trade dress. As Deckers is well aware, the  
4 Supreme Court and courts in this district discourage such “abuse of trade dress law,”<sup>1</sup>  
5 as the proper vehicle to obtain IP rights over footwear is *registering* trade dress or a  
6 design patent.<sup>2</sup> Of course, registering IP protection requires USPTO examination.  
7 Registering trade dress, in particular, requires a *showing* that the footwear has attained  
8 secondary meaning, which even Deckers’ most famous UGG® boot lacked.

9 Knowing it cannot make the proper secondary meaning showing, Deckers  
10 circumvents these established processes through filing hundreds of federal lawsuits  
11 (about 200 in the Central District) for alleged unregistered trade dress infringement,  
12 recycling boilerplate allegations across ten different shoes. Deckers thus believes it  
13 can escape any scrutiny concerning whether its footwear warrants IP protection—at  
14 least through summary judgment and/or coerced settlement with “competitors” like  
15 Costco, Wal-Mart, and hundreds of others—arguing that its conclusory, factually bare  
16 secondary meaning allegations survive a 12(b)(6) motion. Deckers is incorrect, and  
17 the Court should not countenance its attempt to avoid scrutiny on secondary meaning.

18 **II. RELEVANT FACTS RELIED ON BY DECKERS**

19 Deckers’ scant nine lines on “factual background” (Opp. 3:11-19) state it is  
20 “one of the biggest footwear companies in the United States,” with brands like  
21 UGG®, founded 1979, and Costco sells “a wide range of products” through (member-  
22 only) retail stores and online at www.costco.com. (*Id.*, citing FAC, ¶¶8-9, 18, 19, 21.)  
23 Deckers mentions other conclusory allegations in passing (Section IV.1, *infra*; Opp.  
24 3:11-19, 11:1-6, 12:11-20, citing FAC, ¶¶8-16, 18, 19, 21, 23, 28-33), but abandons

25  
26 <sup>1</sup> See Mot. 15 (*Deckers Outdoor Corp. v. Wal-Mart Stores, Inc.*, No. 2:20-CV-  
09521-FLA (EX), 2024 WL 2208099, at \*10 (C.D. Cal. Apr. 9, 2024) (discussing  
*Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 212–13 (2000)).

27 <sup>2</sup> Per *Samara Bros.*, copyright protection is also available for original designs, but  
28 the design of a shoe itself is a useful article, not copyrightable. U.S. Copyright  
Office, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 924.2 (3d ed. 2021)  
(discussing *Star Athletica, LLC, v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017)).

1 other allegations (e.g. inherent distinctiveness) for reasons noted in the Motion.  
2 Decker's bare-bones "factual background" section, traditionally where a plaintiff  
3 recites the facts alleged in the complaint that state a claim for relief, speaks volumes.

4 Notably, while Deckers laments that Costco seeks judicial notice of "extrinsic  
5 evidence" relied on in the FAC (e.g. five articles Deckers directly quotes, Dkt. 26,  
6 RJN Exs. 16-20) or otherwise properly noticeable (e.g. Deckers' other complaints,  
7 *id.*, Exs. 11-15), Deckers argues facts in opposition beyond the FAC:

- 8 • In its first paragraph, Deckers argues it "sued Costco in 2023 for  
9 selling knockoffs of its famous UGG® Classic Ultra Mini Boot"  
10 (Opp. 1:6-8), i.e. a prior case not alleged in the FAC (settled by  
11 confidential agreement without admission of liability).
- 12 • In the second, Deckers argues that "customers and the media have  
13 frequently referred to Costco's lookalike products as low-cost 'look  
14 alike' or 'copies' of Deckers' distinctive designs." (Opp. 1:18-20).

15 On both points, Deckers does not cite the FAC, as there is no such allegation.

16 **III. DECKERS INCORRECTLY ARGUES THAT THE FAC REQUIRES**  
17 **NO SUBSTANTIVE FACTS TO SURVIVE A MOTION TO DISMISS**

18 Unable to allege more than threadbare conclusions, Deckers misstates the legal  
19 standard, ignoring that: (i) the *Twombly/Iqbal* pleading standard requires sufficient  
20 fact allegations, not bald conclusions; (ii) courts routinely adjudicate the sufficiency  
21 of secondary meaning allegations at the pleading stage; and (iii) facts subject to  
22 judicial notice and incorporation-by-reference may be considered per Rule 12(b)(6).

23 Deckers' arguments misapprehend the law; alleging some plausible facts does  
24 not allege "enough facts to state a claim to relief that is plausible on its face." *Bell*  
25 *Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). While "[w]hether a mark has  
26 obtained secondary meaning is question of fact to be determined by a jury" (Opp.  
27 2:11-13, citing *Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 991 (9th Cir. 2006)<sup>3</sup>

28 <sup>3</sup> Deckers also cites two decisions by this Court not addressing secondary meaning.

(denying summary judgment), on a motion to dismiss, the Court generally accepts the factual matter alleged as true and decides whether those facts suffice to plead secondary meaning, as shown by the plethora of cases cited in the Motion. (Mot. at 9:3-16; *see also*, *Hot Focus Inc. v. Best Accessory Grp. LLC*, 2022 WL 3013032, at \*7-8 (C.D. Cal. June 23, 2022) (secondary meaning presents “question of fact,” but plaintiff failed to allege sufficient facts on relevant factors).) Hence, the fact-intensive nature of the secondary meaning inquiry does not exempt Deckers from pleading facts to make it plausible.

The Court may also consider judicially noticed materials without error, per Costco’s concurrently-filed Reply ISO its RJN. In any event, the Court need not rely on contested exhibits to grant the Motion, as Deckers’ deficient factual allegations do not plausibly allege secondary meaning.

**IV. DECKERS’ CONCLUSORY ALLEGATIONS LACK FACTS RENDERING SECONDARY MEANING PLAUSIBLE**

**1. Deckers’ Bare Legal Conclusions and Meaningless Qualifiers Cannot Support Secondary Meaning.**

Instead of pleading facts on secondary meaning, i.e. the “mental association by a substantial segment of consumers... between the alleged trade dress and a single source” (Mot. 7:16-8:6 [citation omitted]), Deckers uses patently conclusory or otherwise meaningless general qualifiers, i.e.:

(1) Deckers spent “substantial time, effort, and money in designing, developing, advertising, promoting, and marketing” Tasmans, and as a result, sold millions of dollars of Tasmans (Opp. 6:20-22, citing FAC, ¶13);

- The FAC is devoid of factual allegations that would supply meaning to the otherwise meaningless qualifier “substantial”; further, Deckers refuses to elaborate on its sales, perhaps only a few hundred pairs per year (Mot. 9-10).

---

(Opp. at 2, n.2; *Daniels v. Specialized Loan Servicing, LLC*, 2023 WL 4291651, at \*3 (C.D. Cal. Apr. 20, 2023) (contract-related claims adequately pled).)



1 (2) “[A] large volume of unsolicited media attention, for example,  
2 through various celebrities seen wearing the UGG® Tasman and [being]  
3 featured in many magazines nationwide and internationally” (Opp. 11:1-6,  
4 citing FAC, ¶¶10-16, 28-32);

5 - Deckers cites alleged “unsolicited media attention,” but demands  
6 that the Court not consider the five articles actually cited in the FAC, which  
7 raise serious doubt about secondary meaning (Mot., *e.g.* p. 11, n. 3).

8 (3) “Deckers spends millions of dollars annually on advertising of  
9 UGG® products, including” Tasmans (Opp. 11:1-6, citing FAC, ¶¶10-16, 28-  
10 32);

11 - This allegation is not specific to Tasmans, allowing the reasonable  
12 inference that little to no UGG®-brand advertising is specific to that shoe  
13 (Mot., pp. 2-3, 5, 9-12, etc.).

14 (4) Coscto’s “close copying of the UGG® Tasman,” purportedly “to  
15 exploit Deckers’ goodwill” (Opp. 12:11-20, citing FAC, ¶¶23, 33);

16 - This allegation relies solely on the alleged visual similarity between the  
17 shoes, without any facts to support Deckers’ legal conclusion of intentional  
18 copying to trade off any claimed trade dress (Mot., pp. 8-9, 14-16, n.4).

19 Deckers’ allegations thus feature bare, general conclusions, not facts (*see, e.g.*,  
20 Opp. pp. 6-7). Indeed, allegations that Deckers has “substantial” advertising/sales,  
21 received “widespread” media coverage, or even faced “deliberate copying” of the  
22 Tasman design by others are not sufficient to support a claim of secondary meaning.

23 Indeed, the Tasman is nowhere near the iconic footwear designs registered by  
24 the USPTO, *e.g.* Louboutin’s red sole or Adidas’s three-stripe trade dress. 1  
25 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 8:7 (5th ed.). In contrast  
26 to these registered footwear designs, Deckers has not even attempted to register the  
27 trade dress for any shoes after its applications to register its most famous shoe’s trade  
28 dress were rejected. (Mot. 12-14; RJN Exs. 5-8.)



Deckers concededly has made no attempt to register its Tasman trade dress, and so never made the factual showing on secondary meaning required. Nor has it ever, in hundreds of cases filed to date, proved any of its shoes' trade dress has secondary meaning. Deckers' failure to show secondary meaning for any of its products, in any proceeding, in any forum, highlights the importance of factual allegations rendering secondary meaning plausible, which it does not have.

**2. Deckers Could Plead Non-Confidential Sales Figures, Image Advertising, or a Secondary Meaning Survey, But Does Not.**

Deckers nonsensically asserts its Tasman sales figures are "confidential," requiring filing under seal. (Opp. 8, n. 6.) Deckers does not explain why sales figures (units sold or revenue, as opposed to profits), are confidential. The very cases Deckers cites make clear that general sales figures are not confidential and should be provided to support secondary meaning. *See Givenchy S.A. v. BCBG Max Azria Grp., Inc.* ("Givenchy"), No. CV 10-8394-GHK SHX, 2012 WL 3072327, at \*5, n.7 (C.D. Cal. Apr. 25, 2012) (trade dress generated "in excess of \$20 millions of revenue... for Givenchy since 2006."); *adidas Am., Inc. v. Skechers USA, Inc.*, 890 F.3d 747, 752 (9th Cir. 2018) (adidas sold "more than 40 million pairs" of Stan Smith shoes, earns "several hundred million dollars in annual domestic sales of [three-stripe] products"). A plaintiff who bears the burden of plausibly alleging secondary meaning cannot hide behind a bare assertion of "confidentiality" as to the amount and exclusivity of sales (particularly unit volumes), which is the lynch pin of secondary meaning.

Likewise, Deckers' arguments as to its failure to allege *any* image advertising miss the mark, as it cites cases in which a plaintiff did image advertising without "look-for" callouts but ensured claimed design features were "prominently visible." (Cf. Opp. 13-14, quoting *Givenchy*, at \*5; *see also id.*, discussing *Adidas-Salomon AG v. Target Corp.*, 228 F. Supp. 2d 1192, 1209 (D. Or. 2002) ("what type of image advertising is required" not critical, as "adidas has done some image advertising.")). Deckers does not point to a single allegation in the FAC as to any advertising showing

1 the Tasman, whether “look-for” ads or just image advertising showing Tasmans at all,  
2 let alone in a way fostering association with trade dress features. The complete  
3 absence of such allegations distinguishes Deckers’ FAC from its cited authorities,  
4 including the Ninth Circuit case misleadingly cited to argue trade dress recognition  
5 does not require “explicitly instructing consumers to ‘look for’ it” (Opp. 13:12, citing  
6 *Jason Scott Collection, Inc. v. Trendily Furniture, LLC*, 68 F.4th 1203, 1216 (9th Cir.  
7 2023), *cert. denied*, 144 S. Ct. 550 (2024).) To be clear, that *Trendily* case does not  
8 mention “look-for” advertising at all, let alone indicate it is unnecessary. Costco’s  
9 Motion directs the Court to the correct Ninth Circuit authority requiring “look-for” or  
10 at least “image” advertising per *First Brands* (Mot. 3, 10-11; 809 F.2d 1378 (9th  
11 Cir.1987)). A handful of out-of-circuit decisions not requiring “look-for” advertising  
12 do not help where Deckers failed to allege image advertising of any kind.

13 Finally, Deckers doubles down on its inapposite “survey from a prior lawsuit”  
14 (Opp. 6:25-26), i.e. a not-yet-admitted<sup>4</sup> survey from a *pending* case that concededly  
15 does not test for secondary meaning. Deckers ignores the critical distinction between  
16 an *Eveready* survey and evidence of actual confusion, only the latter of which is  
17 probative of secondary meaning. That distinction cannot be overlooked, because an  
18 *Eveready* survey is not direct evidence of actual confusion, and is unavoidably leading  
19 on secondary meaning. (Mot. 16, RJN Ex. 21: “What company do you believe makes  
20 or puts out these slippers?” [assumes exclusivity]). In short, even if Deckers’ survey  
21 is ultimately accepted elsewhere, that alleged survey testing for consumer confusion  
22 cannot support secondary meaning, at the pleading stage or otherwise.

23 **3. Deckers Does Not Allege Facts Relied On Elsewhere To Deny**  
24 **A Motion To Dismiss, Including Deliberate Copying.**

25 Deckers asks this Court to overlook the dearth of factual allegations in the FAC  
26

27 <sup>4</sup> Deckers has never proved secondary meaning in hundreds of cases; its only  
28 secondary meaning survey Costco is aware of was stricken “as methodologically  
flawed.” *Deckers Outdoor Corp. v. Wal-Mart Stores, Inc.*, No. 2:20-CV-09521-  
FLA (EX), 2024 WL 2208099, at \*9 (C.D. Cal. Apr. 9, 2024) (Fluff Yeah).

1 to plausibly allege secondary meaning for two reasons: (1) plaintiffs have survived  
2 dismissal with skimpier factual allegations; and (2) Deckers' bald reference to "close  
3 copying" suffices to allege secondary meaning. Neither argument has merit.

4 First, Deckers' attempt to minimize its own pleading burden lacks merit. (Opp.  
5 7:2-8:2 [arguing no "specific allegation" of secondary meaning is needed, only  
6 pleading "generally"].) Deckers' cited case law, however, does not permit its  
7 threadbare allegations to pass muster: for example, *Solid Host, NL v. Namecheap,*  
8 *Inc.*, 652 F.Supp.2d 1092, 1108 (C.D. Cal. 2009) was a cybersquatting case dealing  
9 with a trademark, *not* unregistered product trade dress. There, the court found  
10 allegations sufficient to plead secondary meaning where a hacker purposefully stole  
11 a domain including a trademark to profit, raising an inference of distinctiveness. *Id.*  
12 at 1107-08. The Court cannot make a similar inference here, both because the FAC  
13 lacks concrete facts supporting it, and because it is contrary to the Supreme Court's  
14 direction in *Samara Bros* to scrutinize unregistered trade dress to avoid monopoly.

15 Next, Deckers erroneously claims that complaints with "even *less* detail" have  
16 survived dismissal (Opp. 9:26-27), citing, e.g., *Homeland Housewares, LLC v. Euro-*  
17 *Pro Operating LLC*, 2015 WL 476287 \*4 (C.D. Cal. Feb. 5, 2015). There, however,  
18 the court initially denied plaintiff's motion for preliminary injunction for failure to  
19 show secondary meaning. 2014 WL 4187982, \*8 (C.D. Cal. Aug. 22, 2014)  
20 ("Homeland has not pointed to any evidence of the effectiveness of its advertising in  
21 creating a secondary meaning for its trade dress other than providing the dollar figure  
22 of its overall advertising budget...."). After amendments, the Court considered the  
23 sufficiency of the second amended complaint, in which plaintiff supplemented to add  
24 facts regarding pervasive marketing of its trade dress; defendant's intent to create a  
25 copycat product; and defendant's subsequent use of false, comparative advertising to  
26 undermine plaintiff's product. *See* 2014 WL 10122074 (second amended complaint).  
27 In denying dismissal, the Court considered one exemplary allegation, concluding:  
28 "These allegations are *probably* sufficient, at the pleading stage, to state a claim based

1 on secondary meaning.” 2015 WL 476287, at \*4 (*italics added*). Deckers’ cited cases  
2 do not vindicate its vaguely-alleged FAC.

3 Second, Deckers threadbare allegation of “close copying” cannot salvage its  
4 inability to plead secondary meaning (Opp. 6:6-15; FAC, ¶23). *See Kittrich Corp. v.*  
5 *United Indus. Corp.*, 2017 WL 10434389, at \*6 (C.D. Cal. Oct. 18, 2017) (conclusory  
6 allegation that defendants “willfully and intentionally mimicked the EcoSmart trade  
7 dress” did not suffice to allege secondary meaning); *Deckers Outdoor Corp. v.*  
8 *Fortune Dynamic, Inc.*, 2015 WL 12731929, at \*5 (C.D. Cal. May 8, 2015) (granting  
9 motion to dismiss for failure to allege secondary meaning where “[t]he allegations of  
10 intentional copying are[] conclusory”); *S&B Filters, Inc. v. ETN Cap., LLC*, 2022 WL  
11 2204144, at \*3 (C.D. Cal. Mar. 9, 2022) (same); *Hot Focus Inc.*, 2022 WL 3013032,  
12 at \*7-8 (same); *see also Fuddruckers, Inc. v. Doc’s B.R. Others, Inc.*, 826 F.2d 837,  
13 844 (9th Cir. 1987) (deliberate copying may not be probative of secondary meaning  
14 because there are legitimate reasons for competitors to copy non-protectable features).

15 None of Deckers’ cited authority shows otherwise, i.e. that alleged similarities  
16 alone permit the Court to assume deliberate copying; instead, all cases cited included  
17 additional evidence that the purchasing public associated the trade dress with plaintiff.  
18 *See Vision Sports, Inc. v. Melville Corp.*, 888 F.2d 609, 611, 615 (9th Cir. 1989)  
19 (affirming preliminary injunction; defendant began selling clothing copying logo  
20 months after plaintiff declined to sell to defendant; considered with survey evidence  
21 and copycat advertising campaign); *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251  
22 F.3d 1252, 1264 (9th Cir. 2001) (secondary meaning evidence defeated summary  
23 judgment; defendant’s employees sought to copy the look of the alleged pool hall  
24 trade dress, and inspected plaintiff’s pool hall for that purpose; with survey evidence);  
25 *P & P Imps. LLC v. Johnson Enters., LLC*, 46 F.4th 953, 961-62 (9th Cir. 2022)  
26 (secondary meaning evidence defeated summary judgment where defendant ordered  
27 plaintiff’s game, sent it to manufacturer, then sold nearly identical game months later  
28 with copycat marketing; with survey evidence); *Jason Scott Collection, Inc. v.*

1 *Trendily Furniture, LLC*, 68 F.4th 1203, 1214-16 (9th Cir. 2023) (at trial, court  
2 properly considered conceded copying of direct competitor’s furniture pieces as one  
3 factor showing secondary meaning, with, *e.g.*, consumer recognition evidence).

4 No case holds that a conclusory allegation of “close copying,” supported solely  
5 by alleged visual similarities of two products, suffices to allege secondary meaning at  
6 this stage. Otherwise, asserting that a “competitor”<sup>5</sup> copied products per purported  
7 similarities would plausibly allege secondary meaning in all instances. It does not, as  
8 *Samara Bros.* prohibits such abuse of trade dress law.

9 **4. Deckers Abandoned UCL Attorneys’ Fees and the Tasman,**  
10 **Changing Trade Dress Elements for the “Tasman II”.**

11 Costco noted that Deckers “has only sold a new and different ‘Tasman II’ since  
12 before filing this case” (Mot. 1:4-7), to which Deckers responds that the Tasman and  
13 Tasman II “are virtually identical” (Opp. 18:13-15), *i.e.* not the same. While Deckers  
14 frames this transition as a mere “name-change,” the core issue is that the shoe itself  
15 has changed, specifically in how claimed trade dress elements appear. Deckers’  
16 argument that both shoes embody the Tasman Trade Dress is outside the pleadings,  
17 and the FAC’s failure to identify the Tasman II dooms that shoe’s secondary meaning.

18 Lastly, Deckers concedes it “is not seeking fees under California common law,”  
19 so the motion to dismiss attorneys fees sought on that UCL claim must be granted.

20 **V. CONCLUSION**

21 Deckers need not plead *every* fact relevant to secondary meaning, but it cannot  
22 avoid pleading *any* facts on this critical issue. Because Deckers fails to plead the  
23 requisite facts, its unregistered trade dress does not merit monopoly protection.

24  
25  
26  
27 <sup>5</sup> Costco sells shoes but is not Deckers’ “competitor.” Costco is a warehouse store  
28 selling thousands of items to its members; it does not manufacture shoes or sell  
through other retailers (as Deckers does). The court need not accept as true  
conclusory allegations contrary to facts judicially noticed, or indeed, common sense.

1 Dated: August 27, 2025  
2  
3

RUTAN & TUCKER, LLP  
MICHAEL D. ADAMS  
MEREDITH L. WILLIAMS  
SARAH VAN BUITEN

4 By: /s/ Meredith L. Williams

5 Meredith L. Williams  
6 Attorneys for Defendant  
7 COSTCO WHOLESALE  
8 CORPORATION  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF COMPLIANCE**

The undersigned, counsel of record for Defendant Costco Wholesale Corporation, certifies that this brief contains 2,974 words, which:

  X   complies with the word limit of L.R. 11-6.1.

  X   complies with the 3,000-word limit set by the Court's Standing Order (9.d.) dated May 13, 2025 (Dkt. 8).

Counsel relies on the word count of the word-processing application used to prepare the brief.

Dated: August 27, 2025

RUTAN & TUCKER, LLP  
MICHAEL D. ADAMS  
MEREDITH L. WILLIAMS  
SARAH VAN BUITEN

By:           /s/ Meredith L. Williams          

Meredith L. Williams  
Attorneys for Defendant  
COSTCO WHOLESALE  
CORPORATION